No. 402

SEP 10

JOHN T. FEY

In the Supreme Court Of the United States

OCTOBER TERM, 1956

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Appellant,

vs.

THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, PAUL T. SMITH, LEONARD C. YOUNG AND AUSTIN B. MIDDLETON, MEMBERS OF SAID BOARD, AND ARNOLD H. OLSEN, ATTORNEY GENERAL OF THE STATE OF MONTANA; EDWARD J. OBER, COUNTY ATTORNEY OF HILL COUNTY, MONTANA: BERNARD THOMAS, COUNTY ATTORNEY OF BLAINE COUNTY, MONTANA; STEPHEN GRANNAT, COUNTY ATTORNEY OF PHILLIPS COUNTY, MONTANA; GORDON T. WHITE, COUNTY ATTORNEY OF VALLEY COUNTY, MONTANA; AND WILLIAM B. McCRAKEN, COUNTY ATTORNEY OF ROOSEVELT COUNTY, MONTANA,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

JURISDICTIONAL STATEMENT

EDWIN C. MATTHIAS
ANTHONY KANE
H. V. RHEDIN
Great Northern Building
St. Paul Minn.

T. B. WEIR
NEWELL GOUGH, JR.
EDWIN S. BOOTH
Helena, Montana

Attorneys for the Appellant.

INDEX

	Page
JURISDICTIONAL STATEMENT	1
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	5
STATEMENT OF THE CASE	6
THE FEDERAL QUESTIONS ARE SUBSTANTIAL	13
1. Section 72-123 R. C. M., 1947, Violates the "Due Process" Clause of the Fourteenth Amendment to the Constitution of the United States in Failing to Provide for Notice, Hearing or Opportunity for Hearing	13
2. The Order of the Board Issued Without Notice, Hearing or Opportunity for Hearing Violates the "Due Process" Clause of the Fourteenth Amendment	16
3. The Order of the Board Requiring Train Operation at a Loss, Issued Without Hearing, to Determine Public Convenience and the Court Approval of Such An Order Constitutes a Taking of Property in Violation of Section 1, Fourteenth Amendment and an Undue Burden on Interstate Commerce in Violation of the Commerce Clause of the Constiution of the United States	18
CONCLUSION	19
APPENDIX A.	21
Opinion of the Supreme Court of Montana	21
Dissenting Opinion	27
Opinion of the District Court	32
Findings of Fact and Conclusions of Law of the District Court	34
Judgment and Decree of the District Court	40

NOV 3 1

245960

Page

APPENDIX B. 42

Section 72-119 R.C.M., 1947 42

Section 72-125 R.C.M., 1947 42

Section 72-132 R.C.M., 1947 43

Order 80 of Board of Railroad Commissioners 44

TABLE OF CASES

Atchison, Topeak & Santa Fe Ry. Co. v. Public Utilities Commission, 346 U.S. 346, 98 L. Ed. 51, 74 Sup. Ct. 92 ..... 3, 11

Brooks-Scanlon Co. v. Railroad Commission, 251 U.S. 396, 64 L. Ed. 323, 40 Sup. Ct. 183 19

Central Greyhound Lines, Inc., v. Mealey, 334 U.S. 654, 92 L. Ed. 1633, 68 Sup. Ct. 1260 ..... 3, 11

Charleston Savings & Loan Association v. Alderson, 324 U.S. 182, 89 L. Ed. 857, 65 Sup. Ct. 625 12

Chicago, B. & Q. R. Co. v. Board of Railroad Commissioners, 78 Fed. Supp. 1010 19

Chicago, B. & Q. R. Co. v. Illinois Commerce Commission, 82 Fed. Supp. 368 18

Chicago, B. & Q. R. Co. v. Railroad Commission of Wisconsin, 237 U.S. 220, 59 L. Ed. 926, 35 Sup. Ct. 560 19

Chicago, M. & St. P. Ry. Co., v. Board of Railroad Commissioners, 76 Mont. 305, 247 Pac. 162 .... 14, 16

Chicago, M. St. P. & P. Ry. Co. v. Board of Railroad Commissioners, 126 Mont. 568, 255 Pac. (2) 346 ..... 15, 17, 19

Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 U.S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431 18

TABLE OF CASES—(Continued)

Page

Lake Erie & Western Ry. Co. v. State Public Utilities Commission, 249 U.S. 422, 63 L. Ed. 684, 39 Sup. Ct. 345 3

Morgan v. United States, 304 U.S. 1, 82 L. Ed. 1129, 58 Sup. Ct. 773 15

Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U.S. 292, 81 L. Ed. 1093, 57 Sup. Ct. 724 ..... 3, 15, 17, 18

Pennsylvania-Reading Sea Lines v. Board of Utilities Commission, 74 Atl. (2) 265 19

Railroad Commission of California v. Pacific Gas & Electric Co., 302 U.S. 388, 82 L. Ed. 319, 58 Sup. Ct. 334 15

St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 80 L. Ed. 1033, 56 Sup. Ct. 720 15

State of Washington ex rel. Oregon Railroad & Navigation Co. v. Fairchild, 224 U.S. 510, 56 L. Ed. 863, 32 Sup. Ct. 535 ..... 18, 19

Southern R. Co. v. Virginia, 290 U.S. 190, 78 L. Ed. 260, 54 Sup. Ct. 148 ..... 13, 16, 17, 18

STATUTES CITED

Revised Codes of Montana, 1947:
Section 72-119 ..... 5, 14, 42

Section 72-123 (Sec. 4382 Revised Codes of Montana, 1907) 2, 3, 4, 5, 9, 13, 14, 17

Section 72-125 ..... 5, 42

Section 72-132 ..... 5, 43

Constitution of the United States:
Article I, Section 8, Clause 3 ..... 6, 10, 11, 19

Section I, Fourteenth Amendment 5, 6, 9, 10, 11, 14, 15, 18, 19

Order of the Board of Railroad Commissioners:
Order No. 80 ..... 5, 14, 44

IN THE
SUPREME COURT
OF THE
UNITED STATES

GREAT NORTHERN RAILWAY COMPANY,
a corporation,

Appellant,

vs.

THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, PAUL T. SMITH, LEONARD C. YOUNG AND AUSTIN B. MIDDLETON, MEMBERS OF SAID BOARD, AND ARNOLD H. OLSEN, ATTORNEY GENERAL OF THE STATE OF MONTANA; EDWARD J. OBER, COUNTY ATTORNEY OF HILL COUNTY, MONTANA: BERNARD THOMAS, COUNTY ATTORNEY OF BLAINE COUNTY, MONTANA; STEPHEN GRANNAT, COUNTY ATTORNEY OF PHILLIPS COUNTY, MONTANA; GORDON T. WHITE, COUNTY ATTORNEY OF VALLEY COUNTY, MONTANA; AND WILLIAM B. McCRAKEN, COUNTY ATTORNEY OF ROOSEVELT COUNTY, MONTANA,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

JURISDICTIONAL STATEMENT

Appellant Great Northern Railway Company (Great Northern) appeals from the judgment of the Supreme Court of the State of Montana in cause No. 9555 reversing and setting aside the judgment of the District Court of the Twelfth Judicial District of the State of Montana, and holding valid an order of the Board of Railroad Commissioners of the State of Montana, and

submits this statement to show that the Supreme Court of the United States has jurisdiction and that a substantial question is presented.

THE OPINION BELOW

The opinion of the Supreme Court of the State of Montana dated May 11, 1956, has not yet been reported. Copies of the majority and dissenting opinions are attached hereto as Appendix A (pages 21-31).

Said opinion of the Supreme Court of the State of Montana reversed a lower court judgment in the District Court of the State of Montana, Hill County (not reported). Copies of the opinion of the District Court dated November 3, 1954, its Findings of Fact and Conclusions of Law, and Judgment and Decree entered November 12, 1954, are also set forth in Appendix A (pp. 32-41).

JURISDICTION

1. This is an appeal from the Supreme Court of the State of Montana affirming and holding valid order No. 2445 of the Board of Railroad Commissioners of the State of Montana purportedly issued under authority of Section 72-123, Revised Codes of Montana, 1947, issued without notice, hearing or opportunity for hearing, compelling the operation of two passenger trains within the State of Montana.

2. The Supreme Court of the State of Montana handed down its opinion which constituted its judgment, on May 10, 1956. Appellant's petition for rehearing was denied on July 16, 1956 and order of denial, constituting final judgment, entered on that date. No-

tice of Appeal to this Court was filed by Appellant with the Clerk of the Supreme Court of Montana on July 18, 1956.

3. Jurisdiction of this Court upon appeal is conferred by 28 U.S.C.A. 1257 (2). Appellant challenges the validity of Section 72-123, Revised Codes of Montana, 1947, and the Order of the Board of Railroad Commissioners, purportedly issued under authority of the above statute, the order being "a statute of the state" within the meaning of 28 U.S.C.A. 1257 (2), on the ground, that said statute and said order, and each of them, are in violation of, and repugnant to, the Constitution of the United States, and the decision of the highest court of the state upheld the validity of said statute and said order.

4. Many cases including the following sustain the jurisdiction of this Court on appeal: *Lake Erie & Western Ry. Co. vs. State Public Utilities Commission*, 249 U. S. 422, 424, 63 L. Ed. 684, 39 Sup. Ct. 345; *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292, 299-300, 81 L. Ed. 1093, 57 Sup. Ct. 724; *Atchison, Topeka and Santa Fe Ry. Co. v. Public Utilities Commission*, 346 U. S. 346, 348-349, 98 L. Ed. 51, 74 Sup. Ct. 92; *Central Greyhound Lines, Inc. v. Mealey*, 334 U. S. 654, 655, 92 L. Ed. 1633, 68 Sup. Ct. 1260.

5. *Statutes Involved*: The validity of Section 72-123, Revised Codes of Montana, 1947, (Vol. 4, p. 711) and Order No. 2445 of the Board of Railroad Commissioners of the State of Montana, not officially reported, here involved, read as follows:

"72-123 *Power to compel railroad companies to provide adequate accommodations and service.* The board shall have the power, and it shall be its duty, to compel any and all railroads subject hereto, to provide, maintain and operate sufficient train service, both freight and passenger, for the proper and reasonable accommodation of the public, and to provide and maintain suitable waiting-rooms for passengers, and suitable rooms for freight and baggage at all stations."

ORDER NO. 2445

"ORDER RESTORING TRAIN SERVICE"

"WHEREAS, the Great Northern Railway Company, a corporation duly incorporated under the laws of the State of Minnesota, and operating freight and passenger trains within the boundaries of the State of Montana, on or about April 29, 1954, discontinued the operation of passenger trains Nos. 223 and 224 operating between Havre, Montana and the Montana-North Dakota State Line, and

"WHEREAS, it is the duty of this Board to compel all railroads subject to the provisions of Title 72, Revised Codes of Montana 1947 to provide, maintain, and operate sufficient passenger train service for the proper and reasonable accommodation of the public, and

"WHEREAS, said passenger trains have been operated between Havre, Montana and the Montana-North Dakota State Line for many years prior to April 29, 1954 and this Board is advised that their present and continued operation is necessary for the proper and reasonable accommodation of the public, and is further advised that

public convenience and necessity demand the operation of said trains.

"NOW, THEREFORE, IT IS HEREBY ORDERED that the Great Northern Railway Company forthwith restore and continue to operate until the further order of this Board Passenger Trains Nos. 223 and 224 between Havre, Montana and the Montana-North Dakota State Line on the same schedules as heretofore operated.

DONE this 30th day of April, 1954."

Set forth in Appendix B are Sections 72-119, 72-125, 72-132 of the Revised Codes of Montana, 1947, and Order No. 80 of the Board of Railroad Commissioners (Seventh Annual Report of the Railroad and Public Service Commission of Montana, 1913-14, page 15), all of which are involved as they are referred to in the opinion of the Montana Supreme Court.

QUESTIONS PRESENTED

1. Does a statute of the State of Montana delegating to the Board of Railroad Commissioners of the State of Montana the power to compel the operation of passenger trains or the continued operation of such trains, but failing to provide for notice, hearing or opportunity for hearing before the issuance of orders thereunder, violate the due process clause of Section 1, Fourteenth Amendment to the Constitution of the United States?

2. Does an order of the Board of Railroad Commissioners issued pursuant to such statute, without notice, hearing or opportunity for hearing, ordering the operation of passenger trains which had been op-

erated at an annual loss in excess of $200,000 per year, and the action of the Supreme Court of Montana in affirming such order, violate the due process clause of Section 1, Fourteenth Amendment of the Constitution of the United States?

3. Does an order of the Board of Railroad Commissioners of the State of Montana, requiring the operation of passenger train service at a loss in excess of $200,000 per year, issued without hearing to determine whether public convenience or necessity requires such service, and the action of the Supreme Court of Montana in affirming such order in the face of a finding by the lower court that there was insufficient evidence to establish public convenience and necessity, constitute an unlawful taking of property in violation of and contrary to the provisions of Section 1, Fourteenth Amendment to the Constitution of the United States and an undue burden on interstate commerce in violation of and contrary to the commerce clause of the Constitution of the United States (Article 1, Section 8, cl. 3)?

STATEMENT OF THE CASE

Late in 1953, Appellant, a common carrier of passengers and freight by railroad in Montana, North Dakota and other states, filed with the Board of Railroad Commissioners of the State of Montana (hereinafter referred to as the Board) application to discontinue the intrastate operations of its passenger trains 223 and 224 operating between Williston, North Dakota, and Havre, Montana, alleging that the losses from the operation of such trains exceeded $200,000

per year and that public convenience and necessity no longer required their operation. Appellant's application was set for hearing several months later, at Glasgow, Montana. At that hearing certain persons appearing in opposition to Appellant's application moved that the application be dismissed on the ground that the trains involved were interstate, and the Board, therefore, did not have jurisdiction over them. The Board then and there ruled that it had no jurisdiction in the matter and dismissed Appellant's application. That dismissal still stands and has not been revoked by the Board. (See District Court Opinion, Appendix A, p. 32; Supreme Court Opinion and Dissent, Appendix A, pp. 21-31).

On April 29, 1954, Appellant discontinued the operation of the two passenger trains involved. Immediately after the trains were discontinued the Board by its Order No. 2445 dated April 30, 1954 (supra p. 4) ordered Appellant to forthwith restore and continue to operate, until further order of the Board, trains Nos. 223 and 224 between Havre and the Montana-North Dakota State Line. The order recites:

> "this Board is advised that their present and continued operation is necessary for the proper and reasonable accommodation of the public and is further advised that public convenience and necessity demand the operation of said trains."

This order issued ex parte, without notice, hearing or opportunity for hearing. Lacking any evidence, the Board bases its order on advice from some undisclosed source. It makes no reference to the prior application, to any change in the Board's dismissal of that applica-

tion or any provision for re-opening that proceeding. The order here is a new order on a separate and independent action by the Board.

The result of this order, if allowed to stand, would be to require the Appellant to restore the operation of the trains for an undeterminable period of time while litigating another application to discontinue the trains to final determination. During this time the Appellant would be suffering an out-of-pocket operating loss in excess of $200,000 per year.

In order to avoid the severe penalties imposed for failure to comply with orders of the Board, Appellant on May 7, 1954, filed a complaint in the District Court of Hill County, Montana, requesting judgment that said order of the Board be declared illegal and void and that temporary restraining order, interlocutory and permanent injunction enjoining the enforcement of said order be issued. The complaint raises the federal questions here involved (Par. XVII, tr. 9; Par. XX, tr. 9; Par. XXI, tr. 9-10; Par. XXII, tr. 10; Par. XXIX, tr. 13). The Court issued the temporary restraining order and interlocutory injunction, and on September 10, 1954, the matter came on for trial before the District Court. Thereafter on November 3, 1954, the District Court rendered its opinion (Appendix A, p. 31) stating:

> "On the question of the authority of the Board of Railroad Commissioners to make the order to resume service, the law of this state seems to be settled by our Supreme Court in the case of Chicago, Milwaukee, St. Paul & Pacific Railroad Company vs. Board of Railway Commissioners,

247 Pac. 162, 76 Montana 305, and to be settled against the legality of such order. In any event, if authority to make such an order could be upheld, the authority to make it ex parte, without notice or opportunity for a hearing cannot be upheld."

Findings of Fact, Conclusions of Law, Judgment and Decree were filed on November 12, 1954 (Appendix A, p. 34). The trial court made Findings of Fact to the following effect. That Order No. 2445 was issued without notice or opportunity for the appellant to be heard and without hearing to determine public convenience and necessity on sufficiency of train service; that Section 72-123, R.C.M., 1947 grants to the Board authority to compel proper and reasonable train service but makes no provision for notice, hearing or opportunity to be heard; that the operation of the trains would entail a loss in excess of $200,000 per year, or approximately $600 per day of operation; that order requiring operation of trains in interstate and intrastate commerce, in absence of a finding of public convenience and necessity constitutes and is an undue burden on interstate commerce; that Board heard no evidence prior to issuance of its Order, and that insufficient evidence was presented to the court to establish public convenience and necessity.

Based on these Findings, the Court made, among others, the following Conclusions of Law; that (1) Section 72-123, R.C.M. 1947 violates the due process clause of Section 1, Fourteenth Amendment to the Constitution of the United States; (2) the order of the Board issued without notice, hearing or opportunity for hearing violates the due process clause of Section 1, Four-

teenth Amendment to the Constitution of the United States; (3) the issuance of Order 2445 without first making a finding based on substantial or any evidence that public convenience and necessity require the operation of said trains constitutes and is a taking of private property in violation of Section 1, Fourteenth Amendment to the Constitution of the United States; (4) the issuance of Order 2445 to compel operation of trains engaged in interstate and intrastate commerce, at a loss, without finding of public convenience and necessity, constitutes and is an undue burden on interstate commerce and is in violation of Par. 3, Section 8, Article 1 of the Constitution of the United States; and (5) the order of the Board is in excess of constitutional authority and that said order is not based on evidence to support such order and the action of the Board is arbitrary, unjust and unreasonable. (And must therefore be in violation of the due process clause of the Constitution of the United States.) Judgment granting permanent injunction against the defendants (appellees here) was issued pursuant thereto (Appendix A p. 40).

On March 24, 1955, the Board, its individual members and the Attorney General, appealed from the judgment of the lower court, in accordance with the statutes of Montana. The appellants in the State Supreme Court (appellees here) did not perfect a Bill of Exceptions and therefore the proceedings in the trial court were not before the Supreme Court of Montana. The only factual matters before the State Supreme Court are those found in the transcript here. Appellant's contentions as to federal questions presented to the lower

court and by it decided were fully argued in briefs and oral argument before the Supreme Court of Montana. The State Supreme Court thus had squarely before it the question of the validity of the statute and action of the Board on the ground of its being repugnant to the Constitution of the United States.

The majority opinion holds that the lower court erred in finding the order of the Board of Railroad Commissioners invalid and reverses the judgment. In order to reverse the lower court and hold the Board action valid, the Appellant's contentions and trial court's holding had to be reversed on all federal questions presented, i.e. violation of the due process clause of Section 1, Fourteenth Amendment and the commerce clause of *Article* 1, *Section* 8, *clause* 3 of the Constitution of the United States. *Central Greyhound Lines, Inc. v. Mealey*, 334 U. S. 653, 655, 92 L. Ed. 1633, 68 S. Ct. 1260; *Atchison, Topeka & Sante Fe Ry. Co. v. Public Utilities Commission*, 346 U. S. 346, 348, 98 L. Ed. 51, 74 S. Ct. 92. The Montana Supreme Court by holding the statute and action of the Board to be valid, as against the contentions of the appellant and the Findings and Conclusions of the trial court that both were in violation of the due process and commerce clauses of the Constitution of the United States, thus affirmatively admitted the presence of the federal questions.

The dissenting opinion clearly recognizes the federal question before the Court when it states:

> "Accordingly what the Board did in ordering without notice or hearing the restoration of trains Nos. 223 and 224 coupled with the argument

pressed upon us by its counsel to sustain that action squarely presents for decision the fundamental question whether the order made and the statute as well upon which it is bottomed (R.C.M. 1947, § 72-123) conform to the mandates of our State and Federal Constitutions, and are therefore valid. I think both are unconstitutional and unquestionably void, and that as the challenge is made here a decision of the question put cannot fairly be avoided.

"Specifically I think the order of the Board now challenged and the statute to which that order looks for authority contravene the due process clauses of the Constitutions of both the State of Montana and the United States, U. S. Const. Amend. XIV, § 1; Mont. Const., Art. III, § 27. * * *" (Appendix A, p. 29).

The majority and dissenting opinions thus recognize that the federal questions asserted by the pleadings and action in the lower court were presented for determination. As against these federal questions the majority found both the statute and the order to be valid. Where the state court recognizes that federal constitutional questions were raised and the decision was in favor of validity, this Court has jurisdiction on appeal. *Charleston Savings & Loan Ass'n v. Alderson*, 324 U.S. 182, 185, 89 L. Ed. 857, 65 S. Ct. 624.

The majority opinion reversed the lower court and found that Order No. 2445 was valid, but no provision was made for any hearing. The effect of this action is, except for the stay obtained, to force appellant to restore to service immediately trains operated at a loss of $200,000 per year. Appellant filed a petition for re-

hearing and in this petition specifically contended that the action of the court itself was a denial of the right of due process guaranteed by the Federal Constitution, (tr. 73) *Southern R. Co. v. Virginia*, 290 U. S. 190, 78 L. Ed. 260, 54 S. Ct. 148. This petition was denied (tr. 96). Nothing remained for the lower court to do except vacate the judgment it had made and entered.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

1. SECTION 72-123, R.C.M., 1947, VIOLATES THE "DUE PROCESS" CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN FAILING TO PROVIDE FOR NOTICE, HEARING OR OPPORTUNITY FOR HEARING.

Section 72-123 (supra, p. 4) grants to the Board the "power" and imposes upon it the "duty" to "compel" railroad companies in the State of Montana to provide, maintain and operate "sufficient" freight and passenger train service, and to provide station facilities. There are no restraints upon such power, no safeguards to protect the railroads operating in the State of Montana from the unreasonable or arbitrary demands of the Board.

This is the only statute of the state of Montana giving the Board authority over train service. It contains no provision for notice, hearing or opportunity for hearing, nor does it set up any procedural method to determine what service may be necessary or reasonable for the accommodation of the public.

There is no general statute establishing procedure in such matters. The majority opinion refers to Sec-

tion 72-119, R.C.M., 1947 (Appendix B). It will be noted that this statute gives power of supervision "pertaining to the duty of said board and *within its powers and authority under the provisions of this act*". This section contains no provisions for notice or hearing. It gives no authority over train service, except as provided in Section 72-123. Thus, in the absence of Section 72-123, there is no color of authority to compel train service.

The majority opinion likewise refers to Order 80 (Appendix B). Any order of the Board must, of necessity, be based on statutory authority. Order 80 is based on and specifically refers to the authority and duty of the Board as contained in Section 4382, Revised Codes, 1907, now Section 72-123, R.C.M., 1947. Obviously, the Board, by order, cannot exceed the statutory delegation of authority. Order 80 does not include any provision for notice, hearing or opportunity for hearing. If Section 72-123 is unconstitutional then Order 80 is likewise unconstitutional.

In *Chicago, Milwaukee & St. Paul Ry. Co. v. Board of Railroad Commissioners*, 76 Mont. 305, 247 Pac. 162, a case cited with approval in the lower court opinion and in the majority and dissenting opinion of the Montana Supreme Court in the instant case, it held that a statute authorizing the Board to order installations of facilities but failing to provide for notice, hearing or opportunity for hearing, even though hearing was actually held, violated the due process clause of the Fourteenth Amendment of the Constitution of the United States.

Appellant does not question the right of the state, through a regulatory board, under a proper statute to order train service required by public convenience and necessity. But such authority is subject to the constitutional limitations of the federal constitution and particularly the requirements of due process.

The majority opinion states that the ruling of the Board that it had no jurisdiction over the proceeding to abandon the service so far as it affected intrastate transportation did not justify the discontinance of the trains by the Appellant. It further states that it was the obligation of Appellant to have that action judicially reviewed as a necessary step to procure the consent of the Board for the discontinuance of train service. It is at least a novel theory that a party in whose favor an order is made is obligated to have the order reviewed by the courts. If such action were taken in the initiative of the appellant it would then be in a position where it could not raise the constitutional questions. This was the condition in *Chicago M. St. P. & P. Ry. Co. v. Board of Railroad Commissioners,* 126 Montana 568, 255 Pac. (2) 346.

The due process guaranteed by Section 1 of the Fourteenth Amendment requires that a full and fair hearing be afforded the parties. *Morgan v. United States,* 304 U.S. 1, 14-15, 82 L. Ed. 1129, 58 S. Ct. 773; *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio,* 301 U. S. 292, 304-305, 81 L. Ed. 1093, 57 S. Ct. 724; *Railroad Commission of Calif. v. Pacific Gas & Electric Co.,* 302 U. S. 388, 393, 82 L. Ed. 319, 58 S. Ct. 334; *St. Joseph Stock Yards Co. v. United States,* 298 U. S. 38, 51-52, 80 L. Ed. 1033, 56 S. Ct. 720. The

right to a full and fair hearing on the fundamental facts is essential and the indefinite right of action to review the order does not cure the infirmaties of the law. *Southern R. Co. v. Virginia*, 290 U. S. 190, 78 L. Ed. 260, 54 S. Ct. 148. *Chicago, M. & St. P. Ry. Co. v. Board of Railroad Commissioners*, 76 Mont. 305, 247 Pac. 162.

2. THE ORDER OF THE BOARD ISSUED WITHOUT NOTICE, HEARING, OR OPPORTUNITY FOR HEARING VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

What has been said above as to unconstitutionality of the statute is generally applicable to the action of the Board, taken without notice, hearing or any opportunity of hearing.

The fact that the Board may in its discretion grant hearings is not sufficient. In the instant case it failed to do so. As stated by the state district court in its opinion "To uphold the practice and procedure followed in this case would be to grant to the Board of Railroad Commissioners absolute control and dictatorship over the railway corporation".

The trial court after concluding that the statute was unconstitutional, said "In any event, if authority to make such an order could be upheld, the authority to make it ex parte, without notice or opportunity for hearing cannot be upheld." (tr. 33). The lower court specifically found and concluded that the action of the Board in this instance was in violation of the due process clause of the Fourteenth Amendment to the Con-

stitution of the United States. The dissenting opinion of the Supreme Court of Montana concurs with this view. The majority admits that the Board made no findings of fact and in fact heard no testimony.

Order 2445, issued here (~~Appendix B~~), specifically refers to the language of Section 72-123 for the authority of the Board to issue the order. It then recognizes that its authority to compel train service exists only when such service is required by public convenience and necessity. The Order states that "this Board is advised that their (the trains) present and continued operation is necessary for the proper and reasonable accommodation of the public and is further advised that public convenience and necessity demand the operation of said trains". It is thus apparent that the Board order is not based on any purported violation of law or regulation, as the Supreme court holds, but is based on public convenience and necessity. There was no hearing. There was no testimony on which to base the order and therefore this finding must be based on unsupported and ex parte opinion. Such a denial of due process has been condemned by this Court. *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724; *Southern R. Co. v. Virginia*, 290 U. S. 190 78 L. Ed. 260, 54 S. Ct. 148.

In *Chicago, M. St. P. & P. Ry. Co. v. Board of Railroad Commissioners*, 126 Mont. 568, 255 Pac. (2) 346, the Montana Court outlined the questions for determination on review of Board action. These included the question whether the Board acted beyond the power which it could constitutionally exercise. In the instant

case the constitutionality of the Board's action was before the court and the only possible conclusion is that the State Supreme Court by holding the order valid, approved as constitutional an order issued without notice, without hearing and without opportunity for hearing.

The facts on which the Board's order was issued are not disclosed. There can be no facts because there was no hearing. Appellant was not given any notice, hearing or opportunity for hearing. The action of the Board is so arbitrary as to violate the due process guaranteed by Section 1, Fourteenth Amendment to the Constitution of the United States. *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301, U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724; *Southern R. Co. v. Virginia*, 290 U. S. 190, 78 L. Ed. 260, 54 S. Ct. 148; *Interstate Commerce Commission v. Louisville & Nashville R. Co.* 227 U. S. 88, 91, 33 S. Ct. 185, 57 L. Ed. 431; *State of Washington ex rel Oregon Railroad and Navigation Co. v. Fairchild*, 224 U. S. 510, 531, 56 L. Ed. 863, 32 S. Ct. 535; *Chicago B & Q. R. Co. v. Illinois Commerce Commission*, 82 Fed Supp. 368.

3. THE ORDER OF THE BOARD REQUIRING TRAIN OPERATION AT A LOSS, ISSUED WITHOUT HEARING TO DETERMINE PUBLIC CONVENIENCE AND THE COURT APPROVAL OF SUCH AN ORDER CONSTITUTES A TAKING OF PROPERTY IN VIOLATION OF SECTION 1, FOURTEENTH AMENDMENT AND AN UNDUE BURDEN ON INTERSTATE COMMERCE IN VIOLA-

TION OF THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

If there is a finding of public convenience and necessity, then the question of confiscation of property and undue burden on interstate commerce is to be weighed against that fact, found after hearing and supported by substantial evidence. If public convenience and necessity has not been found to exist, after a hearing and based on substantial evidence, to require operation at a loss constitutes the taking of property in violation of the Fourteenth Amendment and an undue burden on interstate commerce under the Commerce Clause of the Constitution of the United States. This was the lower court holding. *Brooks-Scanlon Co. v. Railroad Commission* 251 U. S. 396, 64 L. Ed. 323, 40 S. Ct. 183, *Chicago, B & Q R. Co. v. Board of Railroad Commissioners*, 78 Fed. Supp. 1010; *Chicago B & Q R. Co. v. Railroad Commission of Wisconsin*, 237, U. S. 220, 59 L. Ed. 926, 35 S. Ct. 560; *Pennsylvania-Reading Sea Lines v. Board of Utilities Comm.* 74 Atl. (2) 265, Certiorari denied 340 U. S. 876; *State of Washington ex rel Oregon Railroad and Navigation Co. v. Fairchild*, 224, U. S. 510, 531, 56 L. Ed. 863, 32 S. Ct. 535. This view was also followed in *Chicago, M. St. P. & P. Ry. Co. v. Board of Railroad Commissioners* 126 Mont. 568, 255 Pac. (2) 346.

CONCLUSION

This appeal brings before this Court federal questions involving due process under Section 1 of the Fourteenth Amendment of the Constitution of the United States and undue burden on interstate com-

merce under the Commerce Clause (Article I, Section 8, clause 3) of the Constitution of the United States, that are so far reaching and substantial in character as to require plenary consideration by this Court with briefs on the merits and oral argument, for their proper determination.

Respectfully submitted,

EDWIN C. MATTHIAS
ANTHONY KANE
H. V. RHEDIN
Great Northern Building
St. Paul, Minnesota

T. B. WEIR
NEWELL GOUGH, JR.
EDWIN S. BOOTH
Helena, Montana
Attorneys for the Appellant.

APPENDIX A

No. 9555.

STATE OF MONTANA, IN THE SUPREME COURT

MARCH TERM, 1956

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Plaintiff and Respondent,

vs.

THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, et al.,

Defendants and Appellants.

Submitted: November 15, 1955.
Decided: May 10, 1956.
Filed: May 10, 1956. Frank Murray, Clerk.

Mr. Justice Angstman delivered the Opinion of the Court.

This is an appeal from a judgment and decree declaring a certain order of the board of railroad commissioners to be void and illegal. The facts giving rise to the controversy are these:

Sometime prior to April 29, 1954, plaintiff requested permission from the board of railroad commissioners to remove trains numbered 223 and 224, operating between Havre, Montana, and Williston, North Dakota, but the request was denied on the ground that the board was without jurisdiction over the matter.

On April 29, 1954, the Great Northern Railway Company discontinued the operation of those trains with-

out approval by the board of railroad commissioners. On the next day the board issued its Order No. 2445 restoring train service between Havre and the Montana-North Dakota state line on the same schedules theretofore governing such operation. Thereafter the district court of Hill County on complaint of plaintiff issued a temporary restraining order restraining the defendants from enforcing Order No. 2445. After hearing and trial a permanent injunction was issued against the defendants enjoining the enforcement of the order upon the ground that it was void and illegal in that no notice was given or hearing held before the order was made. Judgment was entered accordingly and from this judgment the defendants have appealed.

In the complaint filed by plaintiff challenging the validity of the order, the plaintiff alleges in substance that it is operating the trains in question at a financial loss and that their operation is unnecessary and wasteful and places an unreasonable burden on it.

It should be noted that the order of the board did not install new service, it simply ordered reinstated service that theretofore had been in operation and which had been abandoned without permission from the board.

Under R.C.M. 1947, § 72-119, the board "shall have a general supervision of all railroads * * * engaged in the transportation of passengers or property in this state, in all matters appertaining to the duty of said board and within its power and authority under the provisions of this act * * *." And section 72-123 provides, "The board shall have the power, and it shall be its duty, to compel any and all railroads subject there-

to, to provide, maintain, and operate sufficient train service, both freight and passenger, for the proper and reasonable accommodation of the public, and to provide and maintain suitable waiting-rooms for passengers, and suitable rooms for freight and baggage at all stations."

Order No. 80 of the board passed in January 1914 and in full force and effect ever since that time provides in part:

" * * * there shall be no curtailment or discontinuance of passenger train service between points within the State of Montana, except when such curtailment or discontinuance has been authorized by this Commission * * *

"Passenger train service as referred to herein is held to include 'mixed' (freight and passenger), and applies also to the stopping of trains at stations, whether regularly or on flag, and no stops, whether regular or irregular, shall hereafter be discontinued except upon the authority of the Commission."

This order of the board is in line with the authorities throughout the country to the effect that a public utility may not discontinue its service without approval of the public service commission. This has been held in a great many states under statutes no broader than ours. Among the cases so holding are Southern Ry. v. Public Service Commission, 195 S.C. 247, 10 S. E. 2d 769; State ex rel. Daniel v. Broad River Power Co., 157 S.C. 1, 153 S.E. 537; State ex rel. Caster v. Kansas Postal Telegraph-Cable Co., 96 Kan. 298, 150 P. 544; Spring Brook Water Co. v. Village of Hudson Falls, 56 N.Y.S. 2d 722; City of Cincinnati v. Public

Utilities Commission, 137 Oh. St. 437, 30 N. E. 2d 797; and see 73 C.J.S., Public Utilities, § 8, p. 1001, and 43 Am. Jur., Public Utilities & Services, § 78, p. 621.

This is not an "empty form" as was true in Brooks-Scanlon Co. v. Railroad Comm'n, 251 U.S. 396, 64 L. Ed. 323, where after trial and hearing the commission ordered train service reinstated that had been discontinued with the assent of the railroad commission. In that case the order amounted to the institution of new service after all the facts were heard showing the extent of loss from the operations. The court properly ruled in that case that the seeking of permission from the board to discontinue the service would have been an idle ceremony.

The order of the board complained of here simply requires the railroad company to continue the operation of its trains until it obtains approval of the railroad commission, upon a proper showing, to abandon such service. In such proceedings the burden of proof rests upon the railway company to make a showing warranting the abandonment of the service within the principles laid down by this court in Chicago, M., St. P. & P. R. Co. v. Board of Railroad Commissioners, 126 Mont. 568, 255 P. 2d 346. The railway company may not, by abandoning the service without permission of the board of railroad commissioners and without a hearing, shift the burden of proof to the board to submit sufficient proof authorizing an order for the continuance of such service. Rather the proper procedure was followed by the board here to compel the continuance of the service until the railroad company

itself submits adequate proof in appropriate proceedings that the public interest no longer requires the service within the principles of the above cited case and the cases therein cited.

It may well be conceded that if the board were ordering the institution of new or additional service without notice and without an opportunity to be heard the action and the statute authorizing it would be contrary to the state and federal Constitutions within the principles announced in the case of Chicago, M. & St. P. Ry. v. Board of Railroad Commissioners, 76 Mont. 305, 247 P. 162. But as before stated the board here made no findings of fact and in fact heard no testimony that would sustain the institution of any additional service. It did not order new or additional service. All that has been done is to order this maintenance of the status quo until the railway company proceeds in the regular way provided by law and the regulations of the board to sustain the burden of proving a sufficient case justifying the discontinuance of the service in question.

The erroneous ruling of the board that it had no jurisdiction over proceedings to abandon the service so far as it affected intrastate transportation did not justify plaintiff in removing the trains. That order of the board was subject to review (R.C.M. 1947, § 72-125), and in any event it did not authorize the doing of that which the board ruled it had no jurisdiction over.

The obligation to have that order reviewed rested on the railway company, as a necessary step to procure the consent of the board for the abandonment of

the train service. To say that the board's order was tantamount to a declaration that the railway company could do as it pleased about the trains, as stated in the dissenting opinion, is not justified in the face of the rule and regulation of the board made pursuant to the statutes above quoted.

Neither does the fact that the board changed its mind alter the consequences. The railway company also shifted positions in the case. At first it conceded that the consent of the board was necessary before it could discontinue the operation of the trains. It yielded too readily to the finding and conclusion that the board had no jurisdiction over the trains. Instead of contesting that ruling in the proper way, it hastened to act without the consent of the board and this it had no right to do any more than it could raise its rates by its own unilateral action. Compare United Gas Pipe Line Co. v. Mobile Gas Service Corp., decided by the United States Supreme Court on February 27, 1956.

The court erred in holding the order of the board No. 2445 to be invalid. The judgment is reversed.

ALBERT H. ANGSTMAN
Associate Justice

We concur:

HUGH ADAIR
Chief Justice

FORREST H. ANDERSON,
R. V. BOTTOMLY,
Associate Justices

Mr. Justice Davis dissenting:

I dissent.

In the record before us there is no bill of exceptions containing the evidence received at the trial in the lower court. In these circumstances the presumption in this court is that the evidence which we do not have supports at every point the findings made by the trial judge and the judgment entered by him thereon. Warren v. Warren, 127 Mont. 259, 263, 261 P. 2d 364.

At bar the findings are found in the opinion filed by the trial judge as well as in the formal findings of fact and conclusions of law which he made later. Coffman v. Niece, 110 Mont. 541, 544-546, 105 P. 2d 661. These findings, which we accept as the facts of the case reviewed by us here, make it plain that early in 1954 the Great Northern Railway Company asked permission of the Montana Board of Railroad Commissioners to discontinue its trains Nos. 223 and 224, which were then operated by it between Havre, Montana, and Williston, North Dakota, but that upon objection made at the hearing on this application the Board ruled it did not have jurisdiction in the matter. Accordingly it dismissed the application.

This ruling and the order of dismissal which followed were tantamount to an administrative determination by the Board that the Great Northern could do as it pleased about these trains; i. e., that it could discontinue them or not as it saw fit, for the matter was no business with which the Board was in any way concerned. As the majority opinion notes the order made here by the Board was subject to review under R. C. M. 1947, § 72-125.

But the fact is that the order was not reviewed consistent with that statute or in any other manner; a fact of importance to which the majority gives no weight. The dismissal entered stands yet a matter of record established by the Board itself, and by which seemingly it should itself be bound. Moreover, a collateral fact of equal importance, which is also disclosed by the record, is that wholly consistent with this order and certainly in reliance thereon the Great Northern discontinued trains Nos. 223 and 224, of course without consulting the Board again. Indeed, in the face of the order made which told the Great Northern, I emphasize, that these trains were beyond the Board's jurisdiction, it would have been an idle act, or so it seems to me, to ask that Board a second time to give a permission which it had already said in effect it could neither give nor withhold.

Nevertheless, within a matter of hours after these trains were taken off the Board without notice to the Great Northern and without any hearing at all reversed itself, and summarily ordered the restoration of the very train service over which it had said but a day or two earlier it exercised no authority whatsoever. The Board's position taken to spell out its jurisdiction to make this latter order is not strengthened by the niceties of the distinction, as I see it, drawn between an interstate train serving Havre, Montana, and Williston, North Dakota, and in intrastate train "operated between Havre, Montana and the Montana-North Dakota State Line." In either case the Board is speaking of the same trains in fact, however it may describe them. We should deal therefore in my opinion

with the substance of the case and not the fiction of counsel.

The comments of the trial judge who heard this suit in the district court are at this point so apt that I quote from his opinion this paragraph: "If the Board of Railroad Commissioners were correct in their ruling that they had no jurisdiction over these trains, then their order to resume running the trains to the North Dakota Line was an attempt to do by indirection something they concede they could not do directly. This cannot be done."

Here it seems to me we could with propriety end this litigation by affirming the judgment below consistent with the dictates of reason and a sound public policy which ought to control. But apparently the law is otherwise that an administrative body like our Board of Railroad Commissioners may change its mind overnight and rule today to the precise contrary of its holding of yesterday. Or at least such is now the earnest argument made at our bar by counsel for the Board, which seemingly the majority opinion accepts.

Accordingly what the Board did in ordering without notice or hearing the restoration of trains Nos. 223 and 224 coupled with the argument pressed upon us by its counsel to sustain that action squarely presents for decision the fundamental question whether the order made and the statute as well upon which it is bottomed (R.C.M. 1947, § 72-123) conform to the mandates of our State and Federal Constitutions, and are therefore valid. I think both are unconstitutional and unquestionably void, and that as the challenge is

made here a decision of the question put cannot fairly be avoided.

Specifically I think the order of the Board now challenged and the statute to which that order looks for authority contravene the due process clauses of the Constitutions of both the State of Montana and the United States. U. S. Const., Amend. XIV, § 1; Mont. Const., Art. III, § 27. But I do not find it necessary to concern myself further with the Fourteenth Amendment to the Federal Constitution; for as I read our own opinion in Chicago, Milwaukee & St. Paul Railway Co. v. Board of Railroad Commissioners, 76 Mont. 305, 247 P. 162, this court has already expressly held that the due process clause of the State Constitution was violated by another statute and an order made thereunder by this same Board, which can not be distinguished from the statute and the order of the Board brought in issue on this appeal. I agree with the trial judge here that the opinion written in that case is sound, its reasoning controlling of the case now before us. The distinction which the majority opinion makes between that precedent in this court and the controversy now submitted for our judgment is too fine for me to grasp or understand. Insofar as my search has led me that distinction finds no support either in the decisions of this court or elsewhere.

But however that may be and as I see the case in hand the majority opinion cannot stand, unless Chicago,, Milwaukee & St. Paul Railway Co. v. Board of Railroad Commissioners, supra, be overruled either by express statement or fair implication. That decision by a unanimous court has, however, stood for thirty

years the undenied law of Montana. I would not therefore be willing at this late date to repudiate the statement of the law found there, which heretofore no one has thought unsound, even though I did not myself believe it to be beyond criticism. But of what was there decided I have no criticism to offer. Hence I cannot acquiesce in the views of the majority which point the way to another conclusion; for I think they are in error in disregarding the law of this jurisdiction which has already been heretofore correctly announced upon the point they decide.

I could add other pertinent authorities, as I read them, which sustain my position. I could extend my dissent here also by analyzing and there suggesting where I think the authorities cited for the Board are pointless, and in truth fortify rather than weaken the conclusion which I have reached. But I have written enough, I am sure, to indicate my view of the constitutional issue which this appeal raises, and which I think the majority opinion incorrectly resolves. Since that view is not, however, to prevail no purpose will be served by an elaboration further of my reasons for the result I find inescapable, which is that I would affirm in its entirety the judgment of the district court here reviewed.

HORACE S. DAVIS
Associate Justice

OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND JUDGMENT IN THE DISTRICT COURT.

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF HILL.

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Plaintiff and Respondent,

THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, et al.,

Defendants and Appellants.

OPINION

Trains Nos. 223 and 224 were operated on the Great Northern Railway between Havre, Montana, and Williston, North Dakota. They were interstate trains, but also handled considerable intrastate traffic within Montana. Early this year the plaintiff requested permission of the Board of Railroad Commissioners of Montana to discontinue these trains, and a time and place for hearing such request was set by the Board. At the time and place of the hearing certain persons appearing in opposition to the request to discontinue such service objected to the hearing on the ground that the trains being interstate, the Railroad Commission had no jurisdiction over them. The Railroad Commission then and there ruled that they did not have such jurisdiction and dismissed the matter. Shortly thereafter the two trains in question were discontinued, and

immediately the Board of Railroad Commissions issued an ex parte order, without notice, or any opportunity to be heard then, or in the future, directing the Great Northern Railway Company to immediately put these trains back in service to the Montana-North Dakota Line. This action by the railroad to enjoin the enforcement of such order followed.

If the Board of Railroad Commissioners were correct in their ruling that they had no jurisdiction over these trains, then their order to resume running the trains to the North Dakota Line was an attempt to do by indirection something they concede they could not do directly. This cannot be done.

On the question of the authority of the Board of Railroad Commissioners to make the order to resume service, the law of this State seems to be settled by our Supreme Court in the case of Chicago, Milwaukee, St. Paul & Pacific Railroad Company vs. Board of Railroad Commissioners, 247 Pac. 162, 76 Montana 305, and to be settled against the legality of such order. In any event, if authority to make such an order could be upheld, the authority to make it ex parte, without notice or the opportunity for a hearing cannot be upheld. To uphold the practice and procedure followed in this case would be to grant to the Board of Railroad Commissioners absolute control and dictatorship over the railway corporation. All that the State Legislature intended or attempted to give them was the power to regulate, not to control and confiscate.

Some little time was spent on the question of public convenience and necessity. This was done in order that a complete record might be before any appellate court.

Every opportunity was given to the Board of Railroad Commission in this regard, several continuances having been granted at their request. Their attorney protected their interest to the limit, but could only present that which was furnished to him. In the light of the holding contained in the last paragraph, it is not felt necessary to pass upon this question other than to say that the showing of public convenience and necessity was extremely sketchy, and in some respects rather nebulous.

The plaintiff may prepare and present for signature judgment in accordance with this opinion.

DATED this 3rd day of November, 1954.

C. B. ELWELL
Judge.

FILED: November 3, 1954.

(TITLE OF COURT AND CAUSE)

FINDINGS OF FACT

and

CONCLUSIONS OF LAW

The above entitled case came on regularly to be heard on the 10th day of September, 1954, before the above entitled Court, sitting without a jury, and with H. V. Rhedin, Edwin S. Booth, Max P. Kuhr and Newell Gough, Jr. appearing as attorneys for plaintiff, and James B. Patten appearing as attorney for the defendant Board, and it further appearing that all other defendants appeared by answer and were duly notified of the time of hearing, whereupon the Court proceeded to the hearing of the said cause, and the matter having

been submitted on briefs and the Court being fully advised in the premises, the Court rendered its opinion on the 3rd day of November, 1954, and now makes the following Findings of Fact and Conclusions of Law, in conformity with said opinion:

FINDINGS OF FACT

1. That the plaintiff, Great Northern Railway Company, is a corporation duly organized and existing under the laws of the State of Minnesota, and is duly authorized and qualified to do business within the State of Montana, and owns and operates a common carrier line of railroad of both passengers and freight in interstate and intrastate commerce within the State of Montana, and other states, including a main line extending between Havre, Montana and Williston, North Dakota.

2. That the defendant Board of Railroad Commissioners was created by Chapter 37, Laws of 1907, and at all times since has continued to exist under the provisions as amended, being now Title 72 Chapter 1, R.C.M., 1947, and as such has certain statutory powers over railroads operating within the state. That the defendants, John E. Henry, Leonard C. Young and Austin B. Middleton at all times mentioned have been the duly elected, qualified and acting members and constitute the said Board of Railroad commissioners. That on or about October 1, 1954, Frank A. Hazelbaker was duly appointed, and qualified as a member of said Commission in place of John E. Henry, resigned, and will be such Commissioner until his successor is duly elected and qualified.

That the defendant Arnold H. Olsen is the duly elected and acting Attorney General of the State of Montana, and as such is the attorney and is charged with the duty of acting for the defendant Board in the enforcement of its orders and in the recovery of fines and penalties for violation of orders. That the defendant Edward J. Ober is the duly elected, qualified and acting County Attorney of Hill County, Montana; that defendant Bernard Thomas is the duly elected, qualifed and acting County Attorney of Blaine County, Montana; that defendant Stephen Granat is the duly elected, qualified and acting County Attorney of Phillips County, Montana; that defendant Gordon T. White is the duly elected, qualified and acting County Attorney of Valley County, Montana; that defendant William B. McCracken is the duly elected, qualified and acting County Attorney of Roosevelt County, Montana; that each of the defendants in this paragraph named is charged with the duty of assisting the defendant Attorney General in enforcing orders of the defendant Board and recovery of fines and penalties in their respective counties, if so directed by said defendant Attorney General.

4. That on April 30, 1954, the defendant Board, in a proceeding entitled: "In the Matter of railroad passenger service by the Great Northern Railway Company between Havre, Montana and the Montana-North Dakota State Line." designated as Order No. 2445 in Docket No. 4179, ordered the plaintiff, great Northern Railway Company, to operate trains Nos. 223 and 224 between Havre, Montana and the Montana-North Dakota state line.

That said Order No. 2445 of April 30, 1954, issued by defendant Board, was made without notice to the plaintiff and without hearing having been first had by said Board to determine whether the service ordered was proper and reasonable for the accommodation of the public, and was not founded on evidence or finding of fact, after notice and hearing by the Board.

6. That Section 72-123, R. C.M., 1947, and Chapter 1, Title 72, R.C.M., 1947, grants to the defendant Board the power to compel railroads to operate sufficient train service for the proper and reasonable accommodation of the public. Said section, however, fails to provide for the giving of fair, due or proper notice, or any notice whatever to said railroads and fails to provide or afford to said railroads and plaintiff herein a hearing or reasonable opportunity, or any opportunity whatever to offer objections or evidence relative to any order for train service.

7. That the said Order No. 2445 of the defendant Board was made without giving fair, due or proper notice, or any notice whatever to plaintiff ,and without giving or affording plaintiff a reasonable or any opportunity whatever for a hearing on the merits of such Order, and without giving or affording plaintiff a reasonable opportunity, or any opportunity whatever to offer objections to the making of said Order, and said Order was made with out any hearing whatsoever to determine whether public convenience and necessity required said operation, or whether plaintiff was maintaining sufficient train service for the proper and reasonable accommodation of the public.

8. That the ordered operation of trains Nos. 223 and 224 would entail net out-of-pocket operating loss to plaintiff of in excess of $200,000 per year, or approximately $600.00 per day.

9. That plaintiff is engaged in intrastate and interstate commerce and any order compelling operations of trains 223 and 224, which would be engaged in both interstate and intrastate commerce, at a loss, in the absences of finding of public convenience and necessity, constitutes and is an undue burden on interstate commerce.

10. That there was no evidence taken by the Board prior to issuance of its Order to show that public convenience and necessity required operation of the trains and there was insufficient evidence presented in Court to establish that public convenience and necessity required the operation of the train.

THE COURT HAVING MADE FINDINGS OF FACT, HEREBY MAKES THE FOLLOWING:

CONCLUSIONS OF LAW

1. That, by reason of the failure of Section 72-123, Revised Codes of Montana, 1947, to provide for notice, hearing or opportunity for hearing, said Section 72-123 R.C.M., 1947, violates the due process requirements of the Fifth Amendment to the Constitution of the United States and Section 1 of the Fourteenth Amendment of the Constitution of the United States, and Section 27, Article III of the Constitution of the State of Montana.

2. That the action of the Board in issuing Order No. 2445 without notice, hearing or opportunity of

hearing, violates the due process requirements of the Fifth Amendment to the Constitution of the United States and Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 27 of Article III of the Constitution of the State of Montana.

3. That the issuance of Order No. 2445 to compel operations of trains Nos. 223 and 224 at a loss, without first making a finding based on substantial or any evidence that public convenience and necessity requires the operation of said trains, constitutes and is a taking of private property in violation of the provisions of the Fifth Amendment to the Constitution of the United States and Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 14 of Article III of the Constitution of the State of Montana.

4. That the issuance of Order No. 2445 to compel operation of trains engaged in interstate and intrastate commerce, at a loss, without finding of public convenience and necessity, by this plaintiff which operates in interstate and intrastate commerce, constitutes and is an undue burden on interstate commerce, and is in violation of Par. 3, Section 8, Article I of the Constitution of the United States.

5. That the issuance of Order No. 2445, without notice, hearing or opportunity for hearing, was issued without evidence to support said Order, and is in excess of constitutional and statutory authority, and is based on a mistake of law. That said Order is not based on evidence sufficient to support such Order, or

any evidence, and the action of the Board is arbitrary, unjust and unreasonable.

Judgment may be entered in accordance herewith.

DATED at Havre, Montana this 12th day of November, 1954.

C. B. ELWELL,
Judge.

FILED: November 12, 1954.

(TITLE OF COURT AND CAUSE)

JUDGMENT AND DECREE

For the reasons set forth and contained in the opinion, Findings of Fact and Conclusions of Law made and stated by the Court in this cause, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that:

1. The Order of the Montana Board of Railroad Commissioners numbered 2445, dated April 30, 1954, Docket No. 4179, entitled: "In the Matter of railroad passenger service by the Great Northern Railway Company between Havre, Montana and Montana-North Dakota State Line," is void and illegal.

2. The defendants, The Board of Railroad Commissioners of the State of Montana, Leonard C. Young, Austin B. Middleton, Frank A. Hazelbaker, Arnold Olsen, Edward J. Ober, Bernard Thomas, Stephen Granat, Gordon T. White and William B. McCracken, and each and all of them in their respective official capacities and otherwise, and their respective successors in office, and their respective attorneys, officers, deputies, assistants, agents, representatives, employees and all persons in concert and participation with

them be, and they are hereby permanently and perpetually restrained and enjoined from enforcing or giving any effect to that certain Order known as Order No. 2445, dated April 30, 1954, made by said Board of Railroad Commissioners of the State of Montana, entitled: "In the Matter of railroad passenger service by the Great Northern Railway Company between Havre, Montana and Montana-North Dakota State Line," Docket No. 4179, or any Order or Orders made by said Board of like effect, and from compelling or causing plaintiff, Great Northern Railway Company to run, maintain or operate the passenger trains ordered to be operated in and by said Order, to-wit: Trains Nos. 223 and 224, between Havre, Montana and Montana-North Dakota State Line, or like trains or train service, or such trains or train service between any intermediate places; and from instituting or prosecuting any suits or proceedings for the enforcement of said Order or like Order or Orders, or to compel the operation of said trains, or like trains or service, or for the recovery or assessment of any fines, penalties or forfeiture from plaintiff for or on account of the non-operation of such trains or the non-performance of such Orders and from attempting any such enforcement, thing or action.

DATED and DONE at Havre, Montana this 12th day of November, 1954.

C. B. ELWELL
Judge.

FILED November 12, 1954.

APPENDIX B.

Statutes and Orders referred to in Court Opinion

Section 72-119, R.C.M. 1947 (Vol. 4, p. 710):

"*General powers of board.* The board shall have the general supervision of all railroads, express companies, car companies, sleeping-car companies, freight and freight-line companies, and any common carrier engaged in the transportation of passengers or property in this state, in all matters appertaining to the duty of said board and within its power and authority under the provisions of this act; and shall investigate any alleged neglect or violation of the laws of the state by any railroad or other company above specified doing business therein, or by the officers, agents, or employees thereof. The board shall also have the power and authority, and it shall be its duty, to examine and inspect, or cause to be examined and inspected, under its authority, all books, records, files, and papers of the persons and companies specified above, in so far as the same may be pertinent to any matter under investigation before said board, and to hear and take testimony in the progress of any inquiry or investigation authorized by this act."

Section 72-125, R.C.M. 1947 (Vol. 4, p. 712):

"*Court review of action of board—pleadings.* Actions to review the determination of the board fixing any classification, rate, toll, charge, regulation, or order, or the refusal of said board to make, fix, or establish any classification, rate, toll, charge, regulation, or order, shall be commenced in the district court of the county having jurisdiction thereof by the filing of a complaint, duly verified as provided for the verification of

pleadings in civil actions, and notice may be served upon the party defendant, either by summons issued and served as provided for in this code in civil actions, or the court may issue an order directed to the defendant requiring him to answer the complaint at such time as the court may deem reasonable; provided, however, that such time shall not be less than five days from the time of the service of such order. Upon the appearance of the defendant, he may deny or admit the facts set forth in said complaint, by answer, which shall be verified as the pleadings in other civil actions. If, upon the hearing the court shall find that the rates fixed or the classifications made are unjust and unreasonable, it shall thereupon be the duty of said board to make new rates or a re-classification, as the case may be. All orders or notices required under the provisions of this section may be issued by the court, or by the judge thereof at chambers."

Section 72-132, R.C.M. 1947 (Vol. 4, p. 715):

"*Action to determine reasonableness of rates or classification.* Any railroad may bring an action in the district court of the county where the principal office or place of business is situated, or in any county where any such classification, rate, toll, charge, regulation, or order of the board is applicable, against the said board as defendant, to determine whether or not any such classification, rate, toll, charge, regulation, or order made, fixed, or established by the board under the provisions of this act is just and reasonable; provided, that until the final decision in any such action the classification, rate, toll, charge, regulation, or order of the board affecting rates or charges shall be deemed to be final and conclusive; and

provided further, that in any action, hearing, or proceeding in any court, the classification, rate, tolls, charges, regulations, and orders made, fixed, and established by said board shall prima facie be deemed to be just, reasonable, and proper. All costs and expenses incurred in the hearing, trial, or appeal of any action brought under this section shall be fixed and assessed as to the court may seem just and equitable."

Order 80 of the Board of Railroad Commissioners of the State of Montana (Seventh Annual Report of the Railroad and Public Service Commission of Montana, 1913-14, p. 15):

OFFICE OF THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA
ORDER NO. 80

Governing Passenger Train Service

WHEREAS, Section No. 4382, Revised Codes of the State of Montana, makes it the duty of this Commission to compel any and all railroads operating within this state to provide, maintain and operate sufficient train service, both freight and passenger for the proper and reasonable accommodation of the public, and to provide and maintain suitable waiting rooms for passengers, and suitable rooms for freight and baggage at all stations, and

WHEREAS, on the 28th day of May, 1908, the Commission issued its Order No. 17, instructing:

"That no railway, now or hereafter operating within the State of Montana, shall abandon any station either upon main or branch lines, which

now is, or may hereafter be established, without first giving notice thereof to, and receiving the permission from the Board of Railroad Commissioners of the State of Montana, to make such change," and

WHEREAS, some of the common carriers of the state, have from time to time, curtailed or discontinued entirely, passenger train service between certain points without the knowledge or consent of the Commission, and to the disadvantage and detriment of the traveling public,

IT IS ORDERED, that effective at once there shall be no curtailment or discontinuance of passenger train service between points within the State of Montana, except when such curtailment or discontinuance has been authorized by this Commission, and in no event shall the service be diminished within less than ten (10) days after the authority of the Commission has been given, and proper notice thereof having been posted for the information of the public.

Passenger train service as referred to herein is held to include "mixed" (freight and passenger), and applies also to the stopping of trains at stations, whether regularly or on flag, and no stops, whether regular or irregular, shall hereafter be discontinued except upon the authority of the Commission.

The Secretary is directed to serve upon the ,proper officer of each common carrier operating within the State of Montana, a true and certified copy of this Order, and to obtain acknowledgment therefor.

BOARD OF RAILROAD COMMISSIONERS
OF THE STATE OF MONTANA
R. F. McLAREN,
Secretary.

Helena, Montana,
January 9th, 1914.

Note: Section 4382, Revised Codes of the State of Montana, referred to in the above Order, is now Section 72-123, R.C.M., 1947, set forth on Page 4, supra.